

HE WILL HEAR THE CASE

Yesterday's Proceedings in the Tunnel Case Before Judge DeWolfe.

The Writ is Amended so That But One Candidate Appears in the Election—A Demurrer Filed by the Defendants.

Special to the Standard. BUTTE, Oct. 29.—The skirmishing which precedes the great battle between the democratic and republican lawyers on the question of the counting of the vote of the tunnel precinct continued all of today. Although two days' talking have been indulged in, it was not only this afternoon that the phrase "tunnel precinct" was used at all, and the battle proper had just opened. The republicans fight on every technical point their brains can conjure up, and show an evident endeavor to make a farce of the whole proceedings. The writ of mandamus has become a little interested by the two days' skirmishing, but so far as the important matter is concerned, it is uninterested. Late this afternoon the technical points were at least all disposed of and the ground all cleared for action, a battle on the point at issue. The answer of the respondents has been rendered and the battle will begin on that issue in the morning.

Promptly on the stroke of 10 this morning, Judge DeWolfe ascended the bench and called upon Sheriff Thomas to open court. There was already a large number of spectators present. The legal fraternity was almost as largely represented as upon opening of the court yesterday. There were no motions filed and the hearing of mandamus case was resumed.

Mr. Campbell desired to make a slight amendment in the motion to quash the proceedings filed yesterday. There was no objection and the amendment was accordingly made. Court was temporarily suspended for a few minutes to enable Judge DeWolfe to issue final naturalization papers to John C. Eriksen. Resuming court Mr. Campbell entered upon argument upon the motion to quash. He said that the time allowed between the issuance and returning of the writ was only five days whereas the law requires that 10 days shall be given. This court is governed by the practice act of this territory in this matter and that act requires that ten days be given to answer a writ. Therefore the attorneys for the canvassing board could legally make a motion to quash this writ and the court accordingly would be compelled to declare the writ illegal and inoperative.

The court asked if it was not clearly the spirit of the law that a proper and sufficient answer to a writ should be given. There seemed to be a contradiction of authorities and the spirit or intention of the law must be taken. It cannot be done by making this writ return at this time.

Upon the second grounds in the motion Mr. Campbell said there were two writs of the same character in the same case and returnable before the same court at different times. This is clearly illegal. The relator, McHatton, does not know what the defendant board will be willing to respond to the commands of the writ and count the votes in precinct 34 before November 7th, when any of the writs is made returnable. Besides, the writ in McHatton's case invokes the aid of the sovereign to obtain a private right, and, according to law in such a case, the relator must show his private interest in the case. This has not been done in the writ of mandamus issued in McHatton's interest. McHatton demands something for himself and something for the public in his writ. This he cannot do.

Judge DeWolfe thought that because McHatton had a private interest in the case it did not disqualify him from demanding that any other citizen should have under the law. Here the sovereignty of the territory is invoked by a private citizen to obtain his private rights, and the same person invokes the same power to grant him the rights of citizenship.

Mr. Campbell said an individual could not demand both a public and a private right in the same writ. The court: "The public interests in this case certainly transcend all private rights, but in justice we must seek wrong either the public or a private individual. It is not for this purpose that our courts of law are maintained. The rights of public citizenship should not be discarded in private individual from enjoyment of his rights."

Campbell vigorously combated this idea and quoted authorities in support of his position. He insisted upon the writs requiring this canvassing board to do the same thing at three different times. The second writ negatives the one made regarding there could not be any proceedings for contempt of court.

The court said that so far as that matter is concerned each writ should stand or fall independently. Every writ of mandamus should be obeyed, and then there could be no cause for proceedings for contempt. There is no reason why each of these writs should not be obeyed unless the parties show legal cause to the contrary.

Mr. Campbell, well, I have done upon that point and now if your Honor please I come to a very delicate point in our case. It is delicate and difficult for even a peer to make every one understand. Your Honor will understand that I refer to your Honor's interest in this case and your consequent disqualification as a judge to sit upon and decide this dispute. I am compelled to quote a great many authorities to prove that your Honor cannot legally try this cause on ground of interest. I will be able to show that you as an interested party to this suit had not even a right to issue the writ of mandamus upon which this cause is brought into this court at this time. Endless authorities can be brought to show that you are wholly disqualified to adjudicate upon this matter."

Judge DeWolfe said: "Mr. Campbell, I do wish to interrupt you, but let me say that it is utterly useless for you to cite me authorities upon this matter. I am fully aware that if the judge's interest in a case is made known, he is disqualified. I have thought of all this. I know full well I am really not an interested party to this suit. I know, and so does the general public that this is a case of public interest very much larger than the entire vote cast in the precinct mentioned in this writ. But I have considered the matter in another light. It may be that the application for amendment is granted and I do not agree with the counsel that it changes the scope of the writ." "Will that be your ruling throughout," asked Mr. Campbell. "I am not laying down any fixed rules," said the court. "Please mark me an exception," said Mr. Campbell. The court then adjourned 15 minutes to permit the amending of the writ and ordering of the vote for district judge, and not only for the other candidates. On reassembling

say I am inclined to view the matter in the light intimated by Mr. Campbell; for, if an amendment in my own mind that I personally cannot gain any private or individual advantage from any decision that may be rendered in this court, yet I was a candidate on some party's ticket with the relators, and I have not yet been officially notified of my defeat, though of course I am well aware that I am defeated by the majority in the tunnel precinct cannot possibly overcome."

Mr. Campbell then became very lenient and said: "But your honor is allowed by law to take judicial notice of a great many facts which will not for a long time at least fall under your notice in any other way than through the columns of the press. These facts not seem to me to be of such importance as to require me to be defeated independent of 'Judge DeWolfe'—nevertheless I do not think it the proper thing for me to say that I have never seen a newspaper notice of self-interest. I do not feel disposed to sit here and issue orders that votes cast for my self be counted. I feel that it is within my jurisdiction to order that the writ be dissolved, and I think it would first be divested of its interest which I may seem to have in the result. In the meantime court will take a recess until 1 o'clock, when counsel for the relator may be given an opportunity to discuss the matter if they desire."

The legal contest was continued when the court reassembled at 1 o'clock. Judge DeWolfe said that he had intimated before adjournment that whether he is actually incompetent to sit on this case is one question, and as to the indecency of the court sitting on a case in which the interested parties are at issue. It is the duty of a judge not only to avoid carefully the commission of a wrong, but even the semblance of wrong. The court said he knew of no possible manner in which he could be interested in the writ of mandamus. Yet he was interested in a certain way, having been a candidate, the vote of the thrown out precinct would affect his vote and thus make it indelicate for him to pass on the question.

Judge McConnell said: "It is easy to show that your honor is not disqualified. In the case of Moses vs. Julian, in reference to the interest of the judge, the court says that no judge ought to withdraw on the ground of interest unless the interest is true in fact and law, and the judge should not be permitted to withdraw without sufficient grounds. There is not a doubt but that you are legally qualified to sit on this case. But we can relieve your honor of that trouble, if the alternative itself were an ironclad constitution and could not be broken, then perhaps there would be no chance of getting rid of the vote for chief justice. And in that event you thought you could not sit on this case. Authorities all establish the doctrine that the peremptory writ must follow the alternative writ. But that does not preclude the party from amending the alternative writ at any time, and have the peremptory writ in accordance with it, so that the ends of justice may not be defeated. An alternative writ may be altered or amended so as to be in conformity with the proceedings and conform thereto. I now wish to move an amendment to this alternative writ by striking out any part which asks the counting of the vote of any candidates except the relator himself. That does away with all indecency, and there is no legal disqualification whatever."

"Do you claim," inquired the court, "that there is any other rule in regard to amendments to an alternative writ of mandamus different from that which applies in an ordinary civil action? It is elementary that in a civil suit the prayer of the complaint constitutes no part of the allegation of the complaint. The way for an alternative writ is to regularly follow the petition or affidavit on which it is based."

"But the writ doesn't follow the order," said Thompson Campbell. "The order is that the board shall count the votes of all voters for officers from precinct 34."

"I care not whether it follows the order or not," said the court. "All I want to know is, does any different rule prevail in regard to amending a writ of this kind from that which prevails in an ordinary case?" Judge Knowles replied: "This is an entirely novel question. It is not a public right, the relator claims a private right of his own. That changes the whole character of the proceedings. It is not the power of the relator to narrow the case to himself. It is the territory that is concerned. It is the right of the territory to have the vote for all candidates counted. And when the vote is taken up piecemeal and counted for one candidate at a time, that is not really within the range of the duties of the canvassing board. The board must canvass for all candidates or for none. I doubt if there is any authority to permit the counting of the vote for one candidate and not for the others."

"In the first place," said Thompson Campbell, "your Honor was totally disqualified from issuing the original order. An amendment can be made only if the original order is preserved in the country of the proceeding and make it conformable thereto. But the amendment must be in strict accordance with the original order. It is not the duty of the counting of the whole vote of Silver Bow county. To count McHatton's vote alone changes the whole scope of the writ and it is not the duty of the board to do so. I would move to throw out this entire proceeding on the ground that there is no such legal term as a 'board of canvassers.' There is no such thing as a board of canvassers for Silver Bow county. It is a misnomer. Yet this writ is issued to the Board of Canvassers. But I will bring up that point later on. Now if they are allowed to keep on striking out everything in this writ, there will be nothing left. Now your Honor has an interest here."

"Not in the least," said the court. "Yes, there is an interest," continued Mr. Campbell. "There is an interest in having a large vote and in making a good appearance among your fellow citizens. Even that is not sailing as close to the wind as some of the authorities sail. If the idea of delicacy had entered your mind, you would have been legally disqualified from permitting the votes to be counted for Mr. McHatton and not for the others, is something which the board is not authorized to do."

"Then," said the court, "you would hold that Mr. McHatton is remediless unless he brings all the other rights of all the other candidates. Suppose all the other candidates are disqualified. Has he no remedy? Is that your position?" "No, not entirely so; but nearly so under the present situation," said Mr. Campbell. "I am clearly of the opinion," said the court, "that an alternative writ stands on precisely the grounds of other civil cases and is amendable. Hence the application for amendment is granted and I do not agree with the counsel that it changes the scope of the writ."

"Will that be your ruling throughout," asked Mr. Campbell. "I am not laying down any fixed rules," said the court. "Please mark me an exception," said Mr. Campbell. The court then adjourned 15 minutes to permit the amending of the writ and ordering of the vote for district judge, and not only for the other candidates. On reassembling

Judge Knowles moved to dismiss the writ. The grounds on which the motion to dismiss the amended writ were made were: First, that said writ is not contained in the order heretofore made. Second, that there is no authority for amending an order of the court. The motion was immediately overruled. Mr. Campbell took an exception.

Mr. Campbell then insisted on the court's personal disqualification to sit on the case, even after the amendment. The court said it did not see how it could be in regard to the relator, and binds nobody who is not a party to the proceeding. When this is amended by asking simply that the vote be counted for J. J. McHatton, it is elementary that the judgment could not refer to others. The court overruled the motion. As to the ground that ten days must intervene between the time of order and time of answer, the court also decided against the defendants. The ground that there are other similar actions now pending, the court said that the bringing of actions by different relators is permitted.

"Are you now prepared to show cause?" inquired the court. "We now file a demurrer," said Mr. Campbell. The grounds of the demurrer were as follows: 1. Said writ is ambiguous and unintelligible in the following particulars: It does not clearly state what election returns this canvassing board is to count. 2. It does not state what office the relator is a candidate for. 3. It does not state by what authority the election was held. 4. It compels the board to count the vote for officers not recognized by law. 5. That the relator has a remedy in his individual capacity and has the means of enforcing his individual rights without making a motion to quash the writ. 6. The writ doesn't state facts sufficient to make a reply to.

Judge Knowles said that the election held in precinct 1 was not a congressional one on the question of voting on the constitution. The election was ordered by the constitutional convention. The election was not held in pursuance of an act of congress, but in pursuance of a statute passed by the constitutional convention. The court ruled that the constitutional convention had acted by a grant of power given it by congress. Power was delegated it by congress to hold an election for all state officers. Judge Knowles took an exception. The judge then objected to the phrase "legislative assembly" in the writ, claiming that the phrase "general assembly" belongs only to the presbyterian church, and as a consequence the general assembly has no existence in law, and that the term is therefore ambiguous. The defendants claimed the right to have everything set clearly before them, before they make a reply to the writ. The court said the salient facts are that votes for the relator were thrown out and that they should be counted.

The whole demurrer was overruled. Warren Loote then asked for the issuance of a peremptory writ. Thompson Campbell thereupon filed this answer to the mandamus: "Thompson Campbell thereupon filed this answer to the mandamus: 'Now can I be above named Wm. W. Jack and W. E. Hall, a majority of said board of canvassers and for answer to this alternative writ of mandamus in the above entitled proceedings deny: 1. That the clerk of this board of county commissioners or the county clerk of the above county received by mail the returns of the vote reported to the returns from voting precinct No. 34 in Silver Bow county, M. T., for the election of October 1, 1890, on the returns of said returns by mail duly sealed and addressed to him the said clerk. 2. That the clerk of this board of county commissioners or the county clerk of the above county received by mail the returns of the vote reported to the returns from voting precinct No. 34 in Silver Bow county, M. 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